MICHIGAN SUPREME COURT

Office of Public Information

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JURY ISSUES BEFORE SUPREME COURT IN ARGUMENTS NEXT WEEK
Minority underrepresentation in 2002 jury pool cited in Kent County criminal case; defendant in Macomb County criminal case argues jurors should not have been allowed to discuss evidence before final deliberations

LANSING, MI, December 2, 2011 – Whether African-Americans were systematically excluded from a Kent County jury pool, and whether that exclusion violated the defendant's Sixth Amendment rights, are at issue in a case that the Michigan Supreme Court will hear in oral arguments next week.

In *People v Bryant*, the defendant objected that African-Americans were underrepresented in the Kent County jury pool for his February 2002 trial, in which he was convicted of criminal sexual conduct and other offenses. An evidentiary hearing established that, due to a computer error, a disproportionately high number of jury questionnaires went to zip codes with lower minority populations, while fewer went to zip codes with more minorities. The defendant argued that a truly random process would have sent questionnaires to a much higher number of African-American potential jurors. Although the trial judge concluded that there was no hard data to show that minorities had been systematically excluded from the jury pool, the Michigan Court of Appeals granted the defendant a new trial. The under-sampling of zip codes with higher minority populations violated the defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community, the appellate court said. The prosecutor appeals that ruling.

The Supreme Court will also hear *People v Richards*, in which the defendant challenges his carjacking conviction on the basis that jurors were allowed to discuss the evidence among themselves during the trial, as opposed to waiting until final deliberations to do so. The judge in that case participated in a pilot program to test proposed changes to rules for juries. As part of that pilot, the trial judge told the jurors at the beginning of trial that they would be permitted to discuss the evidence among themselves in the jury room before final deliberations, so long as all jurors were present. The defendant argues that allowing these discussions during trial deprived him of a fair trial because jurors could influence each other and form conclusions before they had heard all the evidence.

The remaining eight cases that the Court will hear involve criminal, Freedom of Information Act, governmental immunity, medical malpractice, no-fault auto insurance, premises liability, and state employee disability retirement issues.

The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan

Hall of Justice on **December 6 and 7, starting at 9:30 a.m.** each day. The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs are online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, December 6
Morning Session

PEOPLE v COOLEY (case no. 142228)
Court of Appeals case no. 292942
Prosecuting attorney: Joel D. McGormley/(517) 373-4875
Attorney for defendant Michael Carl Cooley: Douglas W. Baker/(313) 256-9833
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William M. Worden/(517) 543-4801
Trial Court: Hillsdale County Circuit Court
At issue: During a traffic stop, the defendant, one of several passengers in the car, got out of the car, but then complied with the police officer's command to get back inside. The officer noticed a cigarette pack on the ground that contained a rock of crack cocaine. The defendant was arrested for possession of cocaine; he denied that the cigarette pack was his and asked for the pack to be tested for fingerprints. After a trial, the defendant was convicted as charged. At sentencing, the trial court scored Offense Variable 19 (MCL 777.49 – interference with administration of justice) at 10 points. The Court of Appeals affirmed, concluding that the score was appropriate based on the defendant's attempts to deflect blame from himself. Can OV 19 be scored under these circumstances?
Background: During a traffic stop, Michael Cooley, one of several passengers in the car, got out, but got back in when the officer who made the stop ordered him to do so. The police officer who made the stop spotted a cigarette pack on the ground near the place where Cooley exited the car; the pack turned out to contain a rock of cocaine. When Cooley was searched, three cigarettes of the same brand as the pack were found in his sweatshirt pocket. Cooley denied that the cigarette pack was his, and he repeatedly asked for the officer to test the pack for fingerprints. A test was conducted, but did not reveal fingerprints.

A jury convicted Cooley of possession of less than 25 grams of cocaine. In sentencing Cooley, the judge assessed 10 points for Offense Variable 19; OV 19 is scored at 10 points if the offender "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Cooley did not challenge the scoring of OV 19 at sentencing; he was sentenced as a fourth habitual offender to 34 to 180 months in prison.

On appeal, Cooley did challenge the scoring of OV 19. He argued that his conduct did not amount to interference with the administration of justice. But in an unpublished per curiam opinion, the Court of Appeals rejected his argument, holding that Cooley's attempts to give the police a false impression about the cocaine's ownership were intended to hamper the police investigation. Cooley engaged in "self-serving deception aimed at diverting suspicion onto the other passengers in the car when he threw the cocaine out the car window or dropped it after

exiting the car, denied ownership, and requested fingerprint analysis," the panel stated. Cooley appeals.

PEOPLE v BRYANT (case no. 141741)
Court of Appeals case no. 280073
Prosecuting attorney: Timothy K. McMorrow/(616) 632-6710
Attorney for defendant Ramon Lee Bryant: Arthur J. Rubiner/(248) 737-4424
Attorney for amicus curiae Attorney General Bill Schuette: B. Eric Restuccia/(517) 373-1124
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Bradley R. Hall/(313) 967-5832
Trial Court: Kent County Circuit Court
At issue: A computer error in Kent County resulted in a disproportionately low number of juror questionnaires being sent to residents of the zip codes that contained the county's highest concentrations of racial minorities. The defendant, who was convicted of several crimes following a jury trial, objected that African-Americans were underrepresented in the jury pool. After an evidentiary hearing, the trial court denied the defendant's motion for a new trial. The Court of Appeals reversed, ruling that the defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community had been violated. In evaluating whether a distinctive group has been sufficiently underrepresented so as to violate the Sixth Amendment's fair cross-section requirement, may a court examine only the composition of the defendant's particular jury venire, or must a court examine the composition of broader pools or arrays of prospective jurors? Must a defendant's claim of underrepresentation be supported by hard data, or are statistical estimates permissible? If so, under what circumstances? Was any underrepresentation of African-Americans in the defendant's venire, or in Kent County jury pools, the result of systematic exclusion of African-Americans?
Background: Ramon Lee Bryant was convicted by a jury of first-degree criminal sexual conduct, armed robbery, and marijuana possession. On the day of jury selection, Bryant objected that his 45-person jury venire (the panel from which his 12-member jury would be selected) appeared to have only one African-American. It was later confirmed that there was only one African-American in the pool of 132 jurors who reported for jury duty at the Kent County Circuit Court that morning, with one other person being "multi-racial." Responses to voluntary questionnaires showed that less than two percent of responding prospective jurors for the month of the trial were African-American. The trial court denied relief, ruling that the numbers were explained by voluntary lack of participation rather than by systematic exclusion of minorities.

Bryant appealed to the Court of Appeals, which remanded the case to the trial court for an evidentiary hearing regarding Bryant's claim that his jury venire did not reflect a fair cross-section of the community. The hearing established that between June 2001 and August 2002, due to a computer error, a disproportionately high number of jury questionnaires went to residents of zip codes with smaller concentrations of minorities; a disproportionately low number of questionnaires went to residents of zip codes with larger concentrations of minorities. An expert selected by the court estimated that questionnaires were sent to 163 African-Americans during the months of January through March 2002, whereas a random process would have sent questionnaires to 322 African-Americans. The expert determined that a systematic bias existed in the selection process in the pools for January through March 2002, but he concluded that there was insufficient evidence to say that African-Americans were significantly underrepresented in Bryant's 45-person jury venire. At the conclusion of the evidentiary hearing, the trial court found

that there was neither substantial underrepresentation of African-Americans nor systematic exclusion of African-Americans in Kent County's jury selection process. The judge concluded that statistical estimates could never be sufficient to show that distinctive groups had been underrepresented; hard data to this effect was required, the judge said.

Bryant again appealed, and in a published opinion, the Court of Appeals vacated Bryant's convictions and remanded for a new trial. Bryant had a Sixth Amendment right to a jury drawn from a fair cross-section of the community, the Court of Appeals said, citing the U.S. Supreme Court's decision in *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979). In *Duren*, the Supreme Court held that, to show a prima facie violation of the Sixth Amendment's fair cross-section requirement, a defendant must show (1) that the group allegedly being excluded is distinctive, (2) that the "representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community," and (3) "that this underrepresentation is due to systematic exclusion of the group in the jury selection process."

The Michigan Court of Appeals held that Bryant established that African-Americans were underrepresented in the group from which his jury was selected; Bryant's venire had 73.1 percent fewer African-Americans than would have been expected for Kent County, the appellate panel concluded. The panel ruled that the underrepresentation in this case was the result of systematic exclusion of African-Americans. The error in the computer program consistently excluded African-Americans from the jury selection process for months; it was irrelevant, the Court of Appeals stated, that the failure to randomly select appeared to have been unintentional. The prosecutor failed to establish that the jury selection system promoted a state interest that was significant enough to outweigh the Sixth Amendment concerns, the Court of Appeals added. The prosecutor appeals.

PEOPLE v RICHARDS (case no. 142234)
Court of Appeals case no. 293285
Prosecuting attorney: Richard J. Goodman/(586) 469-5350
Attorney for defendant Maurice Anthony Richards: Christopher M. Smith/(517) 334-6069
Trial Court: Macomb County Circuit Court
At issue: The defendant was convicted after a jury trial of carjacking and felony-firearm. At trial, the jurors were instructed that they could engage in pre-deliberation discussions amongst themselves as part of a pilot project to study proposed jury reforms. Those proposed rules included allowing judges to inform jurors that they may discuss evidence among themselves during trial recesses. Was the defendant's right to a fair trial and impartial jury prejudiced by allowing the jurors to discuss the evidence before final deliberations?
Background: Maurice Anthony Richards' criminal trial was conducted by a judge who was part of a pilot program to test proposed changes to rules for juries. During preliminary instructions, the trial judge informed the jurors that, as part of the pilot program, they would be permitted to discuss the evidence among themselves in the jury room, so long as all jurors were present. Jurors would not need to wait until the end of the trial, when a jury usually begins its deliberations, to discuss the evidence, the judge told them. However, the judge told the jurors, it was important for them to remember that any discussions they had were tentative, until they heard all of the evidence, the court's final jury instructions, and the attorneys' closing arguments.

At trial, the complainant testified that Richards demanded the complainant's car keys, and that he gave Richards the keys only after Richards motioned toward a gun in the waistband of his pants. According to a police officer, he had patted down Richards and his companion to

search for weapons only moments before the alleged carjacking and did not find a weapon on either man. Richards argued that the officer's testimony established that he did not have a firearm; therefore, Richards contended, at worst he was guilty of unlawfully driving away an automobile, not of carjacking or felony-firearm. But the jury convicted Richards of both carjacking and felony-firearm, indicating that the jury believed that Richards was armed.

Richards appealed, arguing that the jurors' pre-deliberation discussions violated his constitutional rights. When the trial court took its first recess on the second day of trial, the jurors were free to discuss their impressions of the complainant's testimony, including his claim that Richards threatened him with a gun, Richards contended. As a result, the jurors could influence each other, and form conclusions, before they heard later testimony offered by the two police officers who searched Richards and his companion only minutes before the incident at issue without finding a gun, Richards maintained. Richards argued that the Michigan Supreme Court prohibited such discussions decades ago in *People v Hunter*, 370 Mich 262 (1963). The departure from the usual jury procedure not only violated precedent, but also deprived him of his state and federal constitutional right to a fair trial by an impartial jury, Richards asserted.

But the Court of Appeals affirmed Richards' convictions in an unpublished per curiam opinion. The trial court's instructions to the jury – including its warning that the jurors' preliminary discussions were tentative and that Richards was presumed innocent – sufficiently protected Richards' right to have his case decided by a fair and impartial jury, the appellate court said. Richards appeals.

Afternoon Session

JOSEPH v A.C.I.A. (case no. 142615)
Court of Appeals case no. 302508
Attorney for plaintiff Doreen Joseph: Thomas A. Biscup/(586) 566-7266
Attorney for defendant A.C.I.A.: James G. Gross/(313) 963-8200
Attorney for amicus curiae Coalition Protecting Auto No-Fault: Liisa R. Speaker/(517) 482-8933
Attorney for amicus curiae Titan Insurance Company: Mark D. Sowle/(248) 338-2290
Attorney for amicus curiae Insurance Institute of Michigan: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Michigan Catastrophic Claims Association: Jill M. Wheaton/(734) 214-7629
Trial Court: Macomb County Circuit Court
At issue: This no-fault auto insurance case involves the interplay between MCL 500.3145(1), the no-fault act's one-year-back provision, and MCL 600.5851(1), which tolls the applicable limitations period for minors and insane persons. The plaintiff, who suffers from a severe head injury, sued the defendant insurance company to obtain no-fault benefits. The insurance company argued that the plaintiff was barred by the one-year-back rule from recovering no-fault benefits dating back to more than one year before the lawsuit was filed. The trial court ruled that the one-year back rule was tolled by MCL 600.5851(1), which tolls claims brought by minors and insane persons, and that there was a question of fact as to whether the plaintiff was "insane" for purposes of MCL 600.5851(1). Does the tolling provision of MCL 600.5851(1) apply to toll the "one-year back rule" in MCL 500.3145(1)? Was *Regents of the Univ of Michigan v Titan Ins Co*, 487 Mich 289 (2010), correctly decided?
Background: Doreen Joseph became a quadriplegic, and suffered traumatic brain injury, as a

result of a 1977 auto accident; at the time, she was 17 years old. Over the years, Auto Club Insurance Association paid over $4 million to various care providers for Joseph's care and rehabilitation, under her parents' no-fault auto insurance policy. In February 2009, Joseph sued ACIA to compel the insurer to also pay for care provided by her mother, Marilyn Joseph. ACIA filed a motion for partial summary disposition, contending that it was not responsible for paying for care Marilyn Joseph provided. Among other matters, ACIA argued that, under the no-fault act's one-year-back provision, MCL 500.3145(1), Joseph was barred from recovering benefits incurred before February 27, 2008, one year before Joseph filed her lawsuit. MCL 500.3145(1) states that a "claimant may not recover benefits for any portion of the loss incurred more than one year before the date on which the action was commenced." Joseph argued, in response, that the trial court should rely on the tolling provision of MCL 600.5851(1), which states that "if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to . . . bring the action . . . ." The trial court agreed with Joseph and denied ACIA's motion for partial summary disposition. Relying on *University of Michigan Regents v Titan Insurance Co*, 487 Mich 289 (2010), the trial court held that MCL 600.5851(1) preserves claims by minors and insane persons for PIP benefits that otherwise would be barred by the one-year-back rule. The trial court further held that there was a question of fact as to whether Joseph is "insane" for purposes of MCL 600.5851(1). ACIA appeals.

VELEZ v TUMA (case no. 138952)
Court of Appeals case no. 281136
Attorney for plaintiff Myriam Velez: Mark R. Granzotto/(248) 546-4649
Attorney for defendant Martin Tuma, M.D.: Noreen L. Slank/(248) 355-4141
Attorney for amicus curiae Michigan State Medical Society and American Medical Association: Joanne Geha Swanson/(313) 961-0200
Trial Court: Wayne County Circuit Court
At issue: At issue in this case is how a medical malpractice judgment is calculated when the jury awards non-economic damages in excess of those allowed by statute (MCL 600.1483), and there is a setoff for an earlier settlement with another defendant. When is the setoff applied – to the unadjusted jury verdict, before the cap on non-economic damages is applied, or to the final judgment, after the cap is applied? Here, the trial court applied the setoff to the unadjusted verdict and then applied the cap. The Court of Appeals affirmed in a published opinion, holding that the setoff should be applied to the unadjusted verdict.
Background: Myriam Velez, the plaintiff in this medical malpractice case, settled before trial with some of the defendants for $195,000. She then proceeded to trial against defendant Martin Tuma, M.D. The jury returned a verdict for Velez of $124,831.86 for past and present economic damages (although this amount was reduced to zero when collateral source payments were considered), and $1,400,000 for past and present non-economic damages, for a total award of $1,524,831.86.

The dispute in this case is how to calculate the judgment against Tuma, taking into consideration the jury's award of damages and the pre-trial settlement that Velez reached with the other defendants. Liability in this case is joint and several, meaning that each defendant can be held liable for the full amount of Velez's damages; see MCL 600.6304(6)(a). Under MCL 600.1483, non-economic damages are capped, using a statutory formula based on the consumer price index and subject to certain exceptions. In Velez's case, non-economic damages are capped

at $394,200. The parties agree that the settlement that Velez obtained from the other defendants is to be set off against her recovery at trial, because a plaintiff is entitled to only one recovery for her injury.

But the parties disagree as to whether the setoff should be deducted from the full amount of the jury verdict, or from the verdict after the noneconomic damage cap has been applied. Although MCL 600.6306 provides a sequence for calculating a judgment entered after a verdict, the statute is silent as to when to apply the cap on non-economic damages. Velez argued that the $195,000 settlement should be deducted from the jury's award of non-economic damages *before* the cap is applied. The trial court agreed, applying the $195,000 setoff to the unadjusted jury verdict, and then made other adjustments, including applying the cap on non-economic damages. The jury's verdict was reduced to a judgment of $394,200 (the noneconomic damages cap).

Tuma appealed, arguing that the setoff should be taken *after* the non-economic damages cap was applied. In other words, Tuma argued, the judgment should be calculated by beginning with the capped award of non-economic damages, $394,200, and subtracting the $195,000 settlement. The Court of Appeals rejected this argument and affirmed the trial court's ruling in a published opinion. The Court of Appeals held that the setoff rule applies to the "trier of fact's determination of damages, and does not apply to, and directly reduce, the amount of the final judgment." Tuma appeals.

Wednesday, December 7
Morning Session Only

PRINS v MICHIGAN STATE POLICE, et al. (case no. 142841)
Court of Appeals case no. 293251
Attorney for plaintiff Nancy Ann Prins: Bruce A. Lincoln/(616) 374-8816
Attorney for defendant Michigan State Police: Kevin L. Francart/(517) 373-1162
Trial Court: Ionia County Circuit Court
At issue: In a letter dated July 22, 2008, the plaintiff made a Freedom of Information Act request for any video or recording of a traffic stop in which she had been involved. The defendant denied the request in a letter that was dated July 26, 2008, but postmarked July 29, 2008. After learning that a videotape did exist, the plaintiff filed a FOIA lawsuit on January 26, 2009. Was the action commenced "within 180 days after a public body's final determination to deny a request," as required by MCL 15.240(1)? The circuit court calculated the 180-day period from the date on the letter, and said no, dismissing the case. In a published decision, the Court of Appeals reversed, holding that the statute begins to run on the date the public body sends out or officially circulates its denial of a request to produce a public record.
Background: On May 4, 2008, a Michigan State Police trooper stopped a vehicle driven by Nancy Prins and ticketed her passenger for not wearing a seat belt. In a letter dated July 22, 2008, Prins made a Freedom of Information Act request to the Michigan State Police, asking for "[a]ny recording or other electronic media taken by [the trooper] on May 4th, 2008 between the hours of 10:00 am to 12:00 pm of me while traveling upon Morrison Lake Rd and Grand River Rd, within Boston Twp., Ionia County, Michigan." By letter dated Saturday, July 26, 2008, the Michigan State Police denied the request, explaining that "[a]ny car video that may have existed is no longer available. Only kept 30 days [and] reused." This response was postmarked July 29; Prins received it on July 31.

On Monday, January 26, 2009, Prins filed a complaint in Ionia County Circuit Court against the Michigan State Police and David Fedewa, the Michigan State Police's Assistant

Freedom of Information Coordinator, seeking damages for a FOIA violation. Prins claimed in part that the trooper who stopped her in May 2008 had appeared at a formal hearing regarding the seat belt ticket on October 29, 2008 and displayed to the court the same tape that had been the subject of her denied FOIA request. Under Section 10(1)(b) of FOIA, "If a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . [c]ommence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request." The Michigan State Police moved to dismiss Prins' lawsuit, arguing in part that Prins filed her complaint after the statute of limitations ran out, more than 180 days after the date on the State Police's letter (July 26, 2008) denying her FOIA request. Prins responded the statute of limitations began to run, not as of the date of the letter, but on the date that the Michigan State Police mailed the response. Because Prins filed her complaint on the first business day that was 180 days from the postmark date, her lawsuit was timely, she contended. But the trial court granted the Michigan State Police's motion, dismissing the case on the basis that the 180-day period expired before Prins filed her complaint.

Prins appealed, and in a published decision, the Court of Appeals reversed. The court concluded that the Legislature intended a public body to "undertake an affirmative step reasonably calculated to bring the denial notice to the attention of the requesting party." A public body does not satisfy the notice requirement until it "'sends out' or officially circulates its denial," the Court of Appeals held. Accordingly, the 180-day period did not begin to run in Prins' case until the postmark date, the appellate panel said. The Attorney General, on behalf of the Michigan State Police, appeals.

HOFFNER, et al. v LANCTOE, et al. (case no. 142267)
Court of Appeals case no. 292275
Attorney for plaintiff Charlotte Hoffner: A. Dennis Cossi/(906) 932-1221
Attorney for defendants Richard Lanctoe and Lori Lanctoe: Michael K. Pope/(906) 932-4010
Trial Court: Gogebic County Circuit Court
At issue: The plaintiff slipped and fell while walking across an ice patch near the entrance to her fitness club. She sued the landlords and the fitness club. The trial court denied summary disposition to the defendants. The Court of Appeals held that the fitness club and its owners were entitled to summary disposition because they did not control the sidewalk. But, the appeals court held, the landlords were subject to liability because the hazard posed by the ice patch could be deemed "unavoidable." Are the plaintiff's claims against the landlord barred by the "open and obvious danger" doctrine?
Background: Charlotte Hoffner slipped and fell on an icy sidewalk near the only entrance to Fitness Xpress, where she had a membership. The fitness club was located in a commercial building owned by Richard and Lori Lanctoe. Under the lease agreement signed by each tenant, the Lanctoes were responsible for snow removal from the sidewalk and parking lot; Fitness Xpress personnel would occasionally salt the sidewalk in front of the building entrance with salt provided by the Lanctoes.

Hoffner sued the Lanctoes and Fitness Xpress, along with its owners; all the defendants moved to dismiss her claims. The Fitness Xpress defendants argued that they were not liable because they did not have possession and control of the sidewalk where the slip and fall occurred. All the defendants pointed to a release of liability document signed by Hoffner and Fitness Xpress, in which Hoffner agreed to assume and accept any and all risks of injury or

damages related to activities at the fitness club. The defendants also argued that Hoffner was barred from pursuing her claim because of the open and obvious danger doctrine, given that the icy condition of the sidewalk was plainly visible. As a general rule, a premises owner is not required to protect an invitee from dangers that are known to the invitee or that are open and obvious. *Riddle v McLouth Steel Products Corp,* 440 Mich 85 (1992). But liability may be imposed on the premises owner for an open and obvious condition that is "effectively unavoidable." In this case, the trial court denied the motion for summary disposition, concluding that there were disputed questions of fact that a jury would need to resolve. On the issue of whether the icy hazard was unavoidable, the judge concluded that a jury could find that the condition was "effectively unavoidable," reasoning that Hoffner joined the club, which had only one entrance, and that she had a right to get value out of her contract.

The defendants appealed to the Court of Appeals. As in the trial court, the Fitness Xpress defendants argued that they had no possession and control over the sidewalk, all defendants cited the release Hoffner had signed, and all defendants contended that the open and obvious doctrine barred Hoffer's claims. In a published per curiam opinion, the Court of Appeals reversed in part and affirmed in part the trial court's rulings. The appeals panel agreed with the trial court that the release was ambiguous and that the open and obvious doctrine did not bar Hoffner's claims. The dangerous condition was effectively unavoidable, the appellate panel reasoned; "[t]here was no alternative route Hoffner could take in order to enter the exercise facility." The appellate panel did dismiss the claims against the Fitness Xpress defendants, stating that the exercise club could not be held liable because its owners did not have possession and control of the sidewalk where Hoffner slipped and fell. The Lanctoes appeal.

PEOPLE v LAIDLER (case nos. 142442-3)
Court of Appeals case nos. 294147, 295111
Prosecuting attorney: Toni Odette/(313) 224-2698
Attorney for defendant Marteez Donovan Laidler: Jonathan B.D. Simon/(248) 433-1980
Trial Court: Wayne County Circuit Court
At issue: The defendant was convicted of first-degree home invasion and was sentenced to four to 20 years in prison. The trial court assessed 100 points under Offense Variable 3 (MCL 777.33 – degree of physical injury to a victim), based on the fact that the defendant's accomplice was killed by the homeowner during the home invasion. In a split published opinion, the Court of Appeals held that the trial court improperly scored OV 3, and it remanded the case for resentencing. Was the defendant's accomplice a "victim" within the meaning of MCL 777.33(1)? Did his death "result from the commission of a crime" within the meaning of MCL 777.33(2)(b)?
Background: During the early morning of May 5, 2009, Marteez Laidler and Dante Holmes tried to break into a house in Detroit; as Holmes tried to enter through a window, the homeowner shot and killed him. Laidler was charged with first-degree home invasion and was tried before a Wayne County jury. The prosecutor's theory was that Laidler assisted Holmes by helping him up to the window, which was six feet above the ground. The jury found Laidler guilty as charged.

At sentencing, the prosecutor argued that the trial court should assess 100 points under Offense Variable 3 (degree of physical injury to a victim) because Holmes was killed during the home invasion. Defense counsel objected, arguing that Laidler did not intend to kill anyone, and that scoring OV 3 at 100 points would lead to an excessive sentence. The trial judge concluded that she was required to assess 100 points under OV 3 because someone was killed during the commission of the crime. With the scoring of 100 points under OV 3, the trial judge determined that Laidler's guidelines range was range was 36 to 60 months; she sentenced Laidler to four to

20 years in prison.

Laidler appealed. In a split, published opinion, the Court of Appeals affirmed Laidler's conviction, but vacated his sentence and remanded the case to the trial court for resentencing. The trial court erred in assessing 100 points under OV 3, the Court of Appeals majority said, because MCL 777.33(1) authorizes the assessment of points under OV 3 only when a "victim" of the sentencing offense was killed or injured. Holmes was not a "victim" because he was not harmed by Laidler's criminal activity or by the crime that he committed with Laidler; the "victim" was the homeowner, and he was not injured, the majority said. Because there was no "physical injury to a victim" in this case, OV 3 cannot be scored, the majority held. Even if Holmes could be considered a "victim" under the statute, his death resulted from the homeowner's actions, not the commission of a crime, the majority stated. The dissenting Court of Appeals judge would have affirmed the trial court's scoring of OV 3, reasoning that Laidler's crime was home invasion, and that the home invasion resulted in Holmes' death. In this case, said the dissenting judge, both the homeowner and Holmes were victims. The prosecutor appeals.

WHITMORE v CHARLEVOIX COUNTY ROAD COMMISSION (case no. 142106)
Court of Appeals case nos. 289672, 291421
Attorney for plaintiffs Arthur Whitmore and Elaine Whitmore: Liisa R. Speaker/(517) 482-8933
Attorney for defendant Charlevoix County Road Commission: William L. Henn/(616) 774-8000
Attorney for amicus curiae Michigan Association for Justice: Victor S. Valenti/(586) 630-7047
Trial Court: Charlevoix County Circuit Court
At issue: The plaintiffs sued the county road commission for injuries they suffered when their motorcycle hit a pothole in a county road. The trial court denied the defendant road commission's motion for summary disposition, and the Court of Appeals affirmed. Did the plaintiffs demonstrate that the defendant road commission "knew, or in the exercise of reasonable diligence should have known, of the existence of the defect" that rendered the roadway not "reasonably safe and convenient for public travel," MCL 691.1402(1); 691.1403, see *Wilson v Alpena Co Rd Comm*, 474 Mich 161 (2006)?
Background: On May 28, 2006, Arthur and Elaine Whitmore were injured when their motorcycle hit a large pothole on Charlevoix County's Advance Road near the intersection of Cummings Road. Over the next two months, the Charlevoix County Road Commission, which already had a plan to repair the road, patched the pothole and repaved this section of Advance Road.

On September 19, 2006, the Whitmores' attorney gave the road commission notice of his clients' injury and the alleged defect in the road, pursuant to MCL 691.1404(1). On May 27, 2008, the Whitmores filed their lawsuit, alleging, among other matters, that the road commission failed to maintain the improved portion of the roadway in reasonable repair, and failed to repair or warn motorists of the "dangerous and defective condition" in the traveled portion of the roadway – the "large, long-existing pothole . . . present in the northbound lane of Advance Road near its intersection with Cummings Road." The Whitmores relied on MCL 691.1402(1), which states that "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." The government tort liability act (GTLA), MCL 691.1401 *et seq.*, provides that governmental

agencies are liable for injuries arising from road defects only if the agency knew or should have known of the defect: "No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place." MCL 691.1403.

The road commission moved for summary disposition, based in part on its argument that the Whitmores had not established that the road commission knew or should have known of the defect and had a reasonable time to repair it, as required by MCL 691.1403. The trial court denied summary disposition, finding that "it's clear the Road Commission understood that the road needed to be repaired. They had patched it twice since the day of the accident and then completely re-did it shortly thereafter."

The Court of Appeals affirmed the trial court's ruling in a split, unpublished per curiam opinion. With regard to the plaintiffs' claim that the road commission knew or should have known about the defect, all three Court of Appeals judges agreed that the Whitmores' allegations were sufficient to reach a jury. The complaint alleged that the road commission had actual and constructive notice of the "large, long-existing pothole of significant depth and width dimensions present in the northbound lane of Advance Road near its intersection with Cummings Road." The complaint further alleged that the road commission had "previously failed to successfully repair" it. The Court of Appeals held that these allegations were sufficient to fulfill the notice of defect requirements in MCL 691.1403, and that the trial court properly denied summary disposition to the road commission on this issue. The road commission appeals.

NASON v STATE EMPLOYEES' RETIREMENT SYSTEM (case no. 142246)
Court of Appeals case no. 290431
Attorney for petitioner Michael Nason: Karl P. Numinen/(906) 226-2580
Attorney for respondent State Employees' Retirement System: Kyle P. McLaughlin/(517) 373-1162
Trial Court: Marquette County Circuit Court
At issue: The petitioner, a prison guard, fractured his heel while on vacation and applied for non-duty disability retirement under MCL 38.24. The State Employees' Retirement System denied his application, but the Court of Appeals reversed. Is a SERS member eligible for non-duty disability retirement under MCL 38.24, if he is totally incapacitated from performing the state job from which he seeks to retire, but is not totally incapacitated from performing other work within his education, experience, or training?
Background: At the time of his injury, Michael Nason was a 43-year-old prison guard with the Michigan Department of Corrections, a position he had held since 1989. His job duties, maintaining custody and security inside the Marquette Branch Prison, included escorting prisoners, climbing stairs, and being on his feet for six and a half to eight hours per day. While vacationing in Tobago, Nason was hit from behind by a 15-foot wave, which picked him up and drove his heel into the hard-packed sand, shattering his right heel bone. He took a disability leave from work and underwent surgery. Nason then filed an application for non-duty disability retirement under MCL 38.24. That statute allows a member of the State Employees' Retirement System to retire if, among other things, that person becomes "totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty," and a medical advisor certifies that the member is "mentally or

physically totally incapacitated for further performance of his duty . . . ."

The Office of Retirement Services denied Nason's application; he requested an evidentiary hearing in order to appeal that determination. At the hearing, Nason testified that he could not run or use stairs, so he would not have the ability to respond to an incident in the prison. He stated that he was told that his injury was permanent and that he would be unable to return to work as a corrections officer. As of the date of the hearing, he was continuing to look for work. Nason supported his position with testimony from the orthopedic surgeon who performed his surgery. But the State Employees' Retirement System argued, relying on *Knauss v State Employees' Retirement System*, 143 Mich App 644 (1985), that Nason had not shown that he was unable to engage in employment reasonably related to his past experience and training because of a disability that is likely to be permanent. The State Employees' Retirement Board denied Nason's application for benefits, over a hearing officer's recommendation to the contrary, based on Nason's ability to perform other jobs within the experience and training he received before his current job.

Nason appealed to circuit court, arguing both that MCL 38.24 did not preclude benefits simply because he might be able to work in a job other than his current position and that, in this case, the prison guard job was the only position within his qualifications and training. The circuit court agreed, and ruled that the State Employees' Retirement Board erred when it concluded that Nason was not entitled to a non-duty disability retirement.

SERS sought review in the Court of Appeals, which ruled in Nason's favor in a published opinion. The Court of Appeals held that the word "duty" in MCL 38.24 relates solely to the state job from which a SERS member seeks non-duty disability retirement. Accordingly, the appeals court ruled, the plain language of MCL 38.24 only allows consideration of whether a member can perform the state job from which he seeks to retire, not other jobs for which he might have experience and training. Because it was unclear whether the State Employees' Retirement Board found that Nason was totally incapacitated from returning to his job as a corrections officer, the Court of Appeals vacated the circuit court's order and remanded the case to the State Employees' Retirement Board so it could address that issue. SERS appeals.

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